United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 2003

TO : Gail Moran, Acting Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Devro Construction
Case 13-CA-39742

530-5770-0100
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This Section 8(a)(5) case was submitted for advice as to whether to proceed with an outstanding complaint against the Employer for refusing to sign a newly negotiated multiemployer/multiunion collective-bargaining agreement, where, although the Employer's withdrawal from the multiemployer association was untimely, several members of the union group lawfully have refused to sign the same agreement, the Employer and Charging Party Union continue to honor their expired individual agreement, and the multiemployer agreement contains a potentially unlawful provision.[1]

We conclude that the Region should proceed on the outstanding complaint. The absence of the non-signatory local unions from the multiunion group did not affect the viability of the bargaining relationship among the remaining parties and therefore does not constitute an unusual circumstance that would privilege the Employer's refusal to sign the negotiated agreement. The continued application of the expired individual agreement also does not relieve the Employer of Section 8(a)(5) liability because there is no evidence that the Union intended to have that agreement permanently supplant the agreement reached in multiemployer bargaining or that it otherwise

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[1] We concluded in our prior Advice Memorandum, in Case 13-CB-16996, that the Employer is not in the construction industry, and that the relationship between the Employer and the Union is governed by Section 9(a), rather than Section 8(f). No Advice issues are presented in this regard.

acquiesced in the Employer's untimely withdrawal from the multiemployer association. Further, in light of the contractual savings clause, the potential illegality of particular contract provisions would not excuse the Employer's refusal to execute and abide by the negotiated multiemployer agreement.

FACTS

The Employer, Devro Construction, Inc., is an Illinois-based trucking contractor. A large portion of its hauling work is performed under contract with the City of Chicago. In July 1999, the Employer signed an existing multiemployer collective-bargaining-agreement with its employees' authorized representative, International Brotherhood of Teamsters Local 731 (the Union or Local 731).[2] When that contract expired by its terms on May 31, 2000, the Employer and the Union orally agreed to extend the agreement until May 31, 2001. The Employer has, at all times relevant here, continued to adhere to the expired agreement.

In January 2001, a group of nine Chicago-area Teamsters locals, including Local 731, met to discuss the possibility of seeking a Chicago area-wide pit and quarry agreement. Around the same time, at some point between late 2000 and April 2001, a number of trucking contractors in the Chicago area decided to form the Chicagoland Dump Truck Haulers Association (the Association or CDTHA) for the purpose of bargaining on a multiemployer basis.[3] Unlike the Employer, most of these employers were already members of MABRA and other Chicago-area multiemployer associations and had, for many years, been signatory to agreements with Local 731 and other Chicago-area Teamsters locals. These longstanding agreements covered highway, heavy construction and on-site construction hauling, but not "pit and quarry" work, which involves over-the-road material hauling from suppliers to construction sites. Local 731 and four other Teamsters locals had collective-bargaining agreements with

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[2] The April 1, 1995-May 31, 2000 contract was between Local 731 and the Mid-America Regional Bargaining Association (MABRA). The Employer was not a MABRA member and signed the contract on a nonmember/"me-too" basis.

[3] The precise timing and circumstances surrounding CDTHA's formation are unclear. The instant submission states that CDTHA was established at the end of 2000, whereas the Region's prior submissions to Advice in Case 13-CB-16996 place the Association's formation in the spring of 2001.

CDTHA-member employers; four others (Locals 179, 325, 673, and 705) had no bargaining history with any Association employer. Collective-bargaining negotiations between the multiunion group and CDTHA apparently began in March.

Thereafter, on April 14, 2001,[4] Employer Secretary David Roti attended an Association meeting, where he signed the Association's Mutual Assistance Agreement (MAA). The 3-page document states, inter alia, that "it is the desire and intention of the Members to unite and cooperate in negotiating jointly . . . on a multi-employer basis" and that "each Member agrees to surrender its bargaining rights to the Association, and to execute, be bound by, and perform any collective bargaining agreement negotiated . . . in accord with this Agreement." The MAA also contains a provision requiring each member to contribute to a fund to pay the Association's costs and expenses. It does not contain any provision or procedures governing withdrawal from Association membership.

It appears that, after signing the MAA, Roti represented the Employer at only one bargaining session.[5] Roti admits to receiving notice of subsequent meetings to discuss the progress of negotiations and contract ratification.[6] The Employer has not contributed to the Association fund as required by the MAA.

On July 30, after some 39 bargaining sessions, the parties reached impasse. Local 731 and some of the participating locals struck CDTHA-member employers, apparently including Devro.[7] The strike ended on August 10 and the Association's final offer was accepted by the multiunion group and thereafter ratified by the employees in the multiemployer bargaining unit, including the Devro employees. The ratified agreement contains, at Article 5, a "severability and savings" provision and, at Article 19, a work preservation clause restricting subcontracting to

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[4] All dates hereafter are in 2001 unless otherwise indicated.

[5] The exact date of the meeting is uncertain, but based upon [*FOIA Exemptions 6, 7(C), and 7(D)*] and a CDTHA meeting attendance sheet provided to us by the Region, the date appears to have been May 22.

[6] It is unclear whether these latter meetings were bargaining sessions, CDTHA-only meetings to discuss the status of negotiations, or both.

[7] The Employer claims that it was not struck.

contract signatories, and was to be effective August 20, 2001 to April 30, 2004. On August 20, Local 731 business agent Tim Dunlop presented the agreement to the Employer for signature. The Employer, through Roti, refused either to execute or abide by the agreement, and informed Dunlop that the Employer was not a member of the Association.

On October 9, Roti sent a letter to the Association asking to have the Employer's name removed from the CDTHA membership list. The letter states that Roti previously informed both Association and union representatives that the Employer was not part of any multiemployer association for the purpose of contract negotiations. The letter also asserts that Roti attended CDTHA meetings only for informational purposes, or to look into the possibility of coordinating bargaining with other employers. In closing, the letter states that the Employer is committed to negotiating in good faith with Local 731.[8]

The Association denied the Employer's request by letter dated October 19. The Association emphasized that the Employer assigned its bargaining rights to CDTHA on April 14, when Roti signed the MAA, and suggested that if

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[8] Roti states that he attended the April 14 CDTHA organizing meeting after a colleague told him that a group of employers were trying to get together to bargain as one, and after his Local 731 business agent, Dunlop, told him joining the multiemployer association would be a good thing. Roti does not deny signing the MAA, but contends that in doing so, he did not knowingly assign Devro's bargaining rights to the Association. Rather, Roti contends that he was handed the document as he entered the meeting, signed it before the meeting began without really understanding its contents or legal implications, and then, at the end of the meeting, was forced to turn in the signed document before he could leave the meeting room. Roti contends that within 3 weeks of the April 14 meeting, he declined an Association request to support the Association's response to an anticipated strike against some of the larger CDTHA members and was threatened with ouster from the Association if Devro refused to park its trucks during that strike. In response to the Association's threat, Roti claims to have stated that Devro did not do the same work as other CDTHA members and did not want to be part of the Association. Roti asserts that he repeated these claims to the Association's president before and after a May 22 bargaining session. Roti also claims that he informed the Association president that nothing relevant to the Employer's work was at issue in the negotiations.

the Employer disagreed, it should have its attorney contact counsel for the Association. The Association also demanded that the Employer satisfy its financial obligations or face further action by the Association.

In December, following supplemental negotiations to refine certain specific unresolved wage and benefits issues, the Association, Local 731, and four other local unions executed the agreement. It appears that all Association member employers, except the Employer, ultimately signed the agreement as well. Four additional local unions, Locals 179, 325, 673, and 705, refused to sign the agreement, claiming that they had not agreed to be bound by the negotiations and that they did not represent any CDTHA member employer's employees.

On January 22, 2002, the Region issued complaint in this case alleging that the Employer's refusal to sign the agreement violated Section 8(a)(5). That complaint was apparently held in abeyance when the Association thereafter filed Case 13-CB-16996 alleging that Locals 179, 325, 678, and 705 violated Section 8(b)(3) by refusing to sign the negotiated agreement.

By Memorandum dated April 4, 2003, we concluded, inter alia, that although the four locals intended to be bound by the results of group bargaining, they did not violate the Act by refusing to execute the ensuing contract. Thus, because the four locals had never represented employees of Association members, and since none of the Association employers were primarily engaged in the building and construction industry, the unions could not be compelled to sign what would in those circumstances be an unlawful prehire agreement as to them.[9] Accordingly, we instructed the Region to dismiss the 8(b)(3) charge, absent withdrawal.

The Employer has refused to comply with the CDTHA agreement, and instead, as noted above, has continued to honor its expired single-employer agreement, including by paying employee wages, making health, welfare and pension fund contributions,[10] and processing Union-filed grievances under the contractual procedures. The Employer has also

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[9] See Teamsters Local 325, et al. (Chicagoland Dump Truck Haulers Assn.), Case 13-CB-16996, Advice Memorandum dated April 4, 2003.

[10] It appears that some of the Employer's Union fund contributions are in arrears.

unsuccessfully attempted to bring Local 731 to the table to negotiate a successor individual agreement.[11]

ACTION

We conclude that the Region should continue to process the outstanding complaint, absent settlement. There are no circumstances sufficient to privilege the Employer's untimely withdrawal from the Association or excuse its failure to execute and honor the multiemployer agreement. The Employer is obligated to sign the agreement because the bargaining relationship between the Association and the signatory unions in the multiunion group remains viable and precludes a finding of "unusual circumstances" under Retail Associates[12] principles. Further, neither Local 731's continued adherence to the expired individual agreement with the Employer during and after bargaining nor its actions in response to Employer requests to negotiate a new individual agreement connotes acquiescence in the Employer's withdrawal. Finally, the contractual savings clause precludes any Employer defenses based upon any potentially illegal provisions in the negotiated multiemployer agreement.

In Retail Associates, Inc., the Board articulated guidelines for withdrawal from multiemployer bargaining which permit any party to withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate written notice is given. Once negotiations for a new contract have begun, withdrawal is permitted only upon mutual consent of the employer and union bargaining representatives, or in

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[11] The Employer has asserted that the Union agreed to such negotiations. Thus, Roti claims that after the strike ended, he asked Dunlop and Local 731 secretary/treasurer Terry Hancock to bargain for a new contract. According to Roti, Dunlop replied that he would talk to his people and Hancock said he was tied up with a pending election, but would get back to Roti as soon as his schedule cleared. Roti also asserts that he wrote the October 9 letter to the Association at Dunlop's suggestion, averring that Dunlop told him that a statement from CDTHA acknowledging that Devro was not a CDTHA member would help. There is no evidence of any actual individual contract negotiations between the Union and the Employer.

[12] 120 NLRB 388 (1958).

certain specific unusual circumstances.[13] These rules are intended to promote bargaining stability and therefore preclude untimely withdrawals simply because a party is dissatisfied with the results of group bargaining or concludes that being part of the group is no longer beneficial.[14]

The Board will find unusual circumstances where the bargaining unit has become so fragmented, or dissipated, through employer withdrawals that the possibility of meaningful bargaining has been destroyed.[15] Thus, in

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[13] 120 NLRB at 395. "Mutual consent" means the consent of both bargaining representatives. See Charles D. Bonanno Linen Service, Inc., 243 NLRB 1093, 1093 n. 6 (1979), enfd. 630 F.2d 25 (1st Cir. 1980), affd. 454 U.S. 404 (1980) ("an employer who wishes to perfect an untimely withdrawal must secure the consent of both the union and the multiemployer association of which it has been a member").

[14] See, e.g., Dependable Tile Co., 268 NLRB 1147, 1147 (1984) (employer's active participation in group negotiations in an attempt to secure satisfactory terms in the multiemployer agreement while at the same time attempting to reserve the right to reject any agreement not to its liking clearly inconsistent with employer's stated intent to abandon group bargaining and negotiate separately); Associated Shower Door Co., 205 NLRB 677, 682 (1973) (an employer attempting to be a party to group negotiations while reserving the right to reject the outcome of such negotiations is unfairly seeking "the best of two worlds"). See also Detroit Newspapers, 326 NLRB 700, 702 (1998) (differentiating a party's obligation to abide by the fruits of ad hoc group agreement on common issues of concern in the midst of single-employer/single-union bargaining from Retail Associates rules for withdrawals from multiemployer or multiunion bargaining in which the participants have unequivocally agreed to be bound by their group action).

[15] See, e.g., Connell Typesetting Co., 212 NLRB 918, 921 (1974) ("unusual circumstances" found where union had previously consented to withdrawal of 23 of 36 employers and entered into individual concessionary agreements with them, unit was so fragmented "in size and strength that it would be unfair and harmful to the collective-bargaining process" to require respondent employers, whose withdrawals the union opposed, to continue with multiemployer bargaining). See generally Charles D. Bonanno Linen Service, Inc., 243 NLRB at 1093 ("unusual circumstances" exception strictly limited to situations of withdrawing employer's extreme financial duress or where the

determining whether to permit an employer's untimely withdrawal based on a claim of fragmentation, the Board considers whether, on the facts of each case, the multiemployer bargaining relationship remains viable.[16]

The mutual consent requirement can be satisfied even where a party objects to the withdrawal if the objecting party's conduct, in its totality, demonstrates consent to, or acquiescence in, the attempted withdrawal.[17] Union acquiescence may be implied from "a course of affirmative action that is clearly antithetical to any union claim that the employer has not withdrawn from multiemployer bargaining."[18] Passivity or inaction in response to an attempted untimely withdrawal does not amount to acquiescence.[19] Something more is necessary to establish acquiescence, such as the willingness to bargain for an individual agreement intended as a permanent substitute for the agreement being sought in group bargaining.[20] On the

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multiemployer unit has been fragmented to the point where meaningful bargaining is impossible).

[16] Compare Tobey Fine Papers, 245 NLRB 1393, 1395 (1979) (despite removal of 40% of unit employees, withdrawal of two employers from fourteen employer association did not privilege third employer's withdrawal where meaningful bargaining was able to occur) with Corson & Gruman Co., 284 NLRB 1316, 1316 and 1327 (1987) (notwithstanding that only a small portion of the unit was affected, unusual circumstances existed where final agreement between union and one member-employer split the remaining four member employers into two diametrically opposed camps, thereby fragmenting the multiemployer association so it could not function as a unit or effectively represent the four remaining employers).

[17] See, e.g., CTS, Inc., 340 NLRB No. 99, slip op. at 3 (Oct. 9, 2003).

[18] CTS, Inc., 340 NLRB No. 99, slip op. at 3 (emphasis in original), citing I.C. Refrigeration Service, 200 NLRB 687, 689 (1972). See also Reliable Roofing Co., 246 NLRB 716, 716 (1979) (no acquiescence in the absence of overt act indicating consent to employer's withdrawal).

[19] See, e.g., Reliable Roofing Co., 246 NLRB at 716 (no implied consent to employer's withdrawal even though the union waited 4 1/2 months to file the charge and did not otherwise protest the announced withdrawal).

[20] See, e.g., I.C. Refrigeration Service, 200 NLRB at 689 (prime indicator of a union's consent or acquiescence is

other hand, a union's equivocal response to a withdrawing employer's invitation to bargain outside the multiemployer bargaining group will not be construed as acquiescence and will not privilege an untimely employer withdrawal.[21]

Applying these principles, we note at the outset that the Employer signed the MMA which, by its terms, unequivocally bound the Employer to any agreement negotiated by the CDTHA. In addition, the Employer did not announce its intent to withdraw from multiemployer bargaining prior to the commencement of negotiations, and neither the Employer nor the Union consented to the attempted withdrawal. Therefore, it would appear under Retail Associates that the Employer has clearly violated Section 8(a)(5) by refusing to execute and abide by the terms of the multiemployer agreement.

The Region is apparently concerned, however, that, the prior Advice decision that the four nonsignatory locals were not obligated to sign the instant multiemployer agreement may have fragmented the unit, thereby relieving the Employer of its obligation to sign and abide by the same agreement. While we recognize that the four locals represented a large percentage of the original nine-member multiunion bargaining group, mere diminution of the unit does not establish fragmentation.[22] Here, there is no

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its willingness to engage in individual bargaining with the employer seeking to abandon multiemployer bargaining); Hartz-Kirkpatrick Construction Co., Inc., 195 NLRB 863, 868 (1972) (union acquiesced by engaging in separate negotiations with a withdrawing employer, listening to counterproposals, and agreeing to make certain concessions not offered the association); Bartenders, Local 2, 240 NLRB 757, 757, 759-760 (1979) (union acquiesced by, inter alia, acknowledging receipt of employer's withdrawal request, indicating its willingness to meet separately with the employer, and engaging in individual negotiations).

[21] See, e.g., General Printing Co., 263 NLRB 591, 593 (1982) (no acquiescence where union did not know of employer's withdrawal when it agreed to employer invitation "to get together regarding a new contract"); Universal Insulation Corp., 149 NLRB 1397, 1397-1398 (1964) (no acquiescence where union representative's statement that he understood the employer was anticipating withdrawing from multiemployer association and could "sign you up on an individual agreement" indicated only that the union might not object to withdrawal if the employer elected to bargain with it on an individual basis).

indication that the absence of the four nonsignatory locals has in any way undermined the viability of the multiemployer/multiunion bargaining relationship. The four nonsignatory unions do not represent any employees in this multiemployer unit. In addition, the parties successfully completed negotiations, the resulting contract was ratified by the unit employees, and was thereafter executed by their Section 9(a) representatives, the Association and each member employer, except for Devro.[23] Indeed, it appears that the agreement was implemented without any difficulty and that the parties have been abiding by its terms for almost two years. In these circumstances, the absence of the four nonsignatory unions cannot be said to have fragmented or so impaired the viability of the remaining parties' collective-bargaining relationship as to privilege the Employer's withdrawal under the Retail Associates "unusual circumstances" exception.

Next, we considered whether the Union acquiesced in the Employer's withdrawal either by (a) continuing to administer the expired individual agreement with the Employer or (b) agreeing to enter into negotiations for a new individual agreement. In this regard, we note initially that the Association's opposition to the Employer's attempt to withdraw from CDTHA membership precludes a finding of "mutual consent" under Retail Associates. In any event, we agree with the Region that the Union's adherence to the expired agreement does not establish acquiescence in the Employer's attempted withdrawal from the CDTHA. Thus, there is no evidence that the Union ever intended or agreed to substitute the expired individual agreement for the negotiated Association agreement.[24] Nor could the continuation of the terms and conditions of employment established in the parties' old agreement be interpreted as entering into a new individual agreement designed to supplant the negotiated multiemployer agreement. To the contrary, the Union's continued

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[22] See cases cited in nn. 15-16, supra, and accompanying text.

[23] See Associated Shower Door Co., 205 NLRB at 677 (loss of members of multiemployer group has no effect on viability of group bargaining where remaining members and union "are willing to and do continue" bargaining).

[24] See Charles D. Bonanno Linen Service, Inc., 243 NLRB at 1096 (negotiation of interim agreements during bargaining is not inconsistent with, or destructive of, group bargaining since such agreements contemplate adherence to the final multiemployer agreement).

compliance with the terms of the expired agreement amounts to no more than the fulfillment of its desire to afford the employees some measure of representation in the face of the Employer's refusal to abide by the new CDTHA agreement. Such conduct simply cannot be viewed as acquiescence in the Employer's attempted withdrawal.

The Employer's further claim that the Union agreed to enter into negotiations for a new individual agreement to supplant the negotiated multiemployer agreement is similarly without merit. The only evidence of such Union consent consists of the statements Roti asserts Union agents Dunlop and Hancock made in response to his overtures about negotiating a new contract, i.e., Dunlop's statement that he "would talk to his people," Hancock's "promise" to contact Roti as soon as his negotiating schedule cleared, and Dunlop's purported suggestion that confirmation from the Association that the Employer was not a CDTHA member would be useful.[25] In our view, these statements are equivocal and comparable to the union statements the Board rejected as evidence of acquiescence in General Printing Co. and Universal Insulation Corp..[26] Neither the Union's statements, nor its actions, evince the willingness to bargain on an individual basis that the Board relied on in CTS.[27]

The Region is also concerned that the contractual work preservation and standards clause, which limits subcontracting to contract signatories, may be unlawful and could privilege the Employer's refusal to honor the CDTHA agreement. We note that the Employer has not asserted such a defense and, in any event, agree with the Region that the contractual savings provision would leave the balance of

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[25] See n. 11, supra.

[26] See n. 21, supra.

[27] 340 NLRB No. 99, slip op. at 4-5 (acquiescence found where union letter to all employer members of multiemployer association led employer to believe union desired to bargain separately, union responded to employer's subsequent request to meet individually by stating it "would get back to" the employer and "do as [the employer] asked," and the parties actually met and reviewed employer proposals which the union representative thereafter referred to his union superiors).

the agreement intact.[28] Accordingly, even if asserted by the Employer, the potential illegality of the work preservation and standards clause would not privilege the Employer's refusal to execute and adhere to the lawful provisions of the agreement.

As a final matter, we note that although the Employer admits signing the MAA, it also contends that the circumstances surrounding the signing of that document negate any conclusion that it did so with the intent to assign its bargaining rights to the Association and be bound to any agreement reached in negotiations with the multiunion group. The Board recently affirmed the administrative law judge's rejection of a similar argument.[29] In Dutchess Overhead Doors, the employer had originally signed two separate multiemployer agreements with the union, one covering commercial garage door installation work and the other, residential work.[30] In 1991, some time after those original agreements had expired, a dispute over fringe benefits arose between the union and the employer.[31] The dispute was resolved when the union sent the employer a copy of the 1990 version of the commercial agreement, which the employer signed and returned to the union.[32] Several years later, the employer was charged with failing to comply with the terms of the most recent version of the commercial agreement.[33] The employer's defenses included the claim that it signed the 1990 commercial agreement by mistake, thinking it had received and signed the 1990 residential agreement, and that it therefore could not be bound under the current commercial agreement.[34] The administrative law judge

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[28] See, e.g., W.R. Mollohan, Inc., 333 NLRB 1339, 1340 (2001) (where parties have agreed to a general savings clause, the invalidation of a particular section of their agreement does not affect the remainder of the agreement).

[29] See Dutchess Overhead Doors, 337 NLRB No. 27 (2002).

[30] 337 NLRB No. 27, slip op. at 2-3.

[31] Id., slip op. at 3.

[32] Id., slip op. at 4. The 1990 version of the commercial agreement contained a new 9(a) recognition clause and a clause authorizing the multiemployer association to negotiate on the employer's behalf and promising employer compliance with subsequent multiemployer agreements. Id., slip op. at 3.

[33] Id., slip op. at 2.

rejected the employer's claims on credibility grounds and because the employer's testimony as to its belief that the union had proffered and it had signed the 1990 residential agreement was inadmissible parol evidence.[35] The judge acknowledged that the facts did not present a "classic" parol evidence situation, but concluded that the lack of ambiguity in the terms of the contracts militated against accepting evidence that would vary the terms of the contract the employer received and signed.[36] Here, since the language and purpose of the MAA are at least as clear as the identifying language in the 1990 commercial agreement in Dutchess Overhead Doors, it would be similarly improper to allow the Employer's claimed failure to appreciate the legal implications of the document it signed to vary the terms of its agreement with the Association.[37]

B.J.K.

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[34] Id., slip op. at 3-4, 5.

[35] Id., slip op. at 5, quoting Sansla,Inc., 323 NLRB 107, 109 (1997) ("[t]he Board has consistently refused to allow a party to us parol evidence of an alleged oral agreement to vary the terms of a written agreement").

[36] Ibid.

[37] See also Restatement (First) of Contracts § 501 (When Mistake Prevents The Formation Of Contracts), comment b (1932) ("[i]f the misunderstanding is due to the fault of one party and the other party understanding the transaction according to the natural meaning of the words or other acts, both parties are bound by that meaning"), relied on with approval in Stamford Taxi, Inc., 332 NLRB 1372, 1373, n. 6, 1402-1403 (2000) (affirming judge's finding that employer entered into binding, written recognition agreement where only employer was mistaken in its belief that term "lessee drivers" referred to nonstatutory employees).